Capital Case
No. 17-1107

IN THE
Supreme Court of the United States

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENT

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INTRODUCTION

The briefing on the Supplemental Questions confirms that the Court cannot reimpose Respondent's death sentence based on either. On the second Question, everyone (including Oklahoma) agrees that federal reservations are always "Indian country" under § 1151(a). Nothing else need be said.

The first Question requires little more discussion. To begin, Oklahoma continues (at 11) to disavow reliance on it—as Oklahoma did below, at the petition stage, and in merits briefing. Resp. Supp. Br. 3-4. Thus, whatever the Court might say about the relief available to other defendants, the Court cannot reverse the Tenth Circuit's decision here.

Regardless, the first Question provides no basis to reverse. The United States' core theory is this: before statehood, Congress subjected Indians and non-Indians to "the same laws" and the "same court," and after statehood, Congress did nothing to "reinstate ... distinctions" between Indians and others.

But as was true with disestablishment, what this story misses is statutory text. When Oklahoma became a State, the Major Crimes Act gave the federal government exclusive jurisdiction over qualifying Indian crimes on "any Indian reservation" in "any State." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362. That statute dictates distinctions between Indians and non-Indians. No further congressional action was required. To be sure, Congress can override the Act, and it has done so repeatedly—each time "expressly provid[ing]" for State jurisdiction over reservations, and each time

speaking in the clear language necessary to effect such a jurisdictional shift. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-71 (1973); Resp. Supp. Br. 5-6. But no such clear language appears in the United States' decade-long statutory story; indeed, the statutes confirm that federal jurisdiction remained intact.

Nor can Oklahoma gain by employing its brief (at 8-17, 19) principally as sur-reply to oral argument and using fearmongering to argue for disestablishment. Oklahoma's claims are vastly exaggerated, and they are (in any event) for Congress, not this Court. They thus provide no reason to discard the separation-of-powers principle this Court has upheld from *Celestine* to *Parker*: When Congress establishes a reservation, only Congress can disestablish. And only clear statutory text will do.

ARGUMENT: NO STATUTE GIVES OKLAHOMA JURISDICTION TO PROSECUTE INDIANS FOR CRIMES ON RESERVATIONS.

Arkansas law. The United States' story is that, from 1897 to 1904, Congress eliminated distinctions between Indians and non-Indians in Indian Territory—applying to Indians "local laws" and "subject[ing]" them to "the same laws and ... same court" as non-Indians. Then, at statehood, Congress supposedly failed to enact legislation to reinstate those distinctions—hence, Oklahoma today has jurisdiction over Indian crimes on reservations.

This argument is wrong because its *framework* is wrong, ignoring the statutes that control. The text of statutes like the Major Crimes Act created distinctions

between Indians and others in States, and those statutes applied of their own force. No other congressional statute needed to "reinstate" such distinctions. And no statute (or series of statutes) overrode the distinctions Congress had created.

Statutory text aside, the United States' story is pure invention. For one thing, its claims about "local laws" are false. When Congress in 1897 eliminated tribal courts and limited the enforceability of tribal laws, it replaced these tribal courts with *federal* "United States Courts" and those tribal laws with *federal* law—namely "the laws of the United States and the State of Arkansas," with the latter as "incorporated" "federal law." Resp. Supp. Br. 10-11. This pre-statehood *expansion* of federal jurisdiction was nothing like subjecting Indian Territory Indians to state law and certainly did not effect a post-statehood *repeal* of federal jurisdiction.

Nor does the United States' story benefit from legislative history (at 5, 7, 9) reflecting the hostility of some members of Congress to tribes and tribal courts. The question here is whether Congress diminished *federal* authority. And Congress responded to concerns about tribal law and courts by expanding federal law and courts—as other legislative history demonstrates. 29 Cong. Rec. 2341 (1897) (Sen. Vilas) ("I should be much better satisfied to have the United States judges administer the laws"); *id.* at 2342 (Sen. Bate) (laws administered "by judges whom we have sent there").

The United States' argument is particularly misguided given its concession that the Major Crimes Act (and General Crimes Act) *in particular* applied in the Indian Territory beginning in 1890. U.S. Merits Br. App'x 2a-3a. The 1890 Act applied to the Indian Territory general federal law and incorporated Arkansas law (excluding intra-tribal Indian disputes), providing that if those laws defined the same offense, federal definitions "govern[ed]." Resp. Br. 11. The 1897 statute then broadened the application of "the laws of the United States," as well as gap-filling Arkansas law, to Indians. Resp. Supp. Br. 11. It makes no sense to suggest (as the United States does) that this *narrowed* the reach of existing federal laws. "No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but ... it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians." *Washington v. Miller*, 235 U.S. 422, 428 (1914).

Equally mistaken is the United States' reliance on an intuition that, if Indians and non-Indians were subject "to the same criminal laws and ... same courts" before statehood, Congress *must* have continued this one-track jurisdiction after statehood. Statehood *always* created new jurisdictional wedges between Indians and others. The Major Crimes Act does so. In territories, it subjects Indians "to the laws of such Territory relating to [the enumerated] crimes," to "be tried ... in the same courts ... as are all other persons." 23 Stat. 362. So Indians in Oklahoma Territory were tried for Oklahoma Territory murder, in Washington Territory for Washington

murder—in short, "the same criminal laws" in "the same courts" as non-Indians. U.S. Supp. Br. 1; *see Ex parte Gon-shay-ee*, 130 U.S. 343, 352 (1889). But at statehood, the Major Crimes Act enacts "two different legal regimes," U.S. Supp. Br. 6—state law and state courts for non-Indians; federal laws and federal courts for Indians.[1]

More broadly, the rule is that the general "authority of the United States ... to punish crimes ... not committed by or against Indians, [i]s ended by the grant of statehood," but federal "authority in respect of crimes committed by or against Indians continue[s] ... as it was before." *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *see United States v. McBratney*, 104 U.S. 621, 624 (1881). So when Congress has enacted laws governing Indians in States, those statutes may yield "distinctions between Indians and non-Indians," U.S. Supp. Br. 10, absent in territories. Nothing in Congress's pre-statehood statutes created a different rule for Oklahoma.[2]

Transfer. The United States invokes (at 3, 11) the Enabling Act's transfer provision, saying it provided "that Indians and non-Indians were to be treated alike

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[1] The United States invokes citizenship (at 8-9), but that argument fails. *See* Resp. Br. 35.

[2] The Curtis Act's "town site" provisions did not extend state criminal law to Indians. U.S. Supp. Br. 8. Town sites were established under *federal* authority, and towns could only enact ordinances punishable by fines, and only jail offenders (for 30 days) when specifically authorized by statute. *See* Mansfield's Digest of Statutes of Arkansas, ch. 29, §§ 745, 746, 765 (1884).

following statehood." But the text does not say treat Indians and non-Indians "alike." It says treat Oklahoma *and other States* alike. In language the United States and Oklahoma ignore, Congress directed to federal courts prosecutions for crimes "which, had they been committed within a State, would have been cognizable in the Federal courts." Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286 ("1907 Act") (amending Enabling Act § 16) (emphasis added). The United States tells us (at 11) that Congress enacted this language "to fix a drafting error" that could have sent *all* criminal cases to federal court. The point, however, is that when Congress ensured that only *some* cases would be transferred to the State, it identified that subset by specifying that Oklahoma receive only those cases that *other States* would prosecute.

The United States next seeks support from the Enabling Act's supposed identification of "state courts as 'successors' to the United States Court for the Indian Territory." U.S. Supp. Br. 3, 12 (citing *Stewart v. Keyes*, 295 U.S. 403, 409-10 (1935)). But the Act did not say the state courts were "successors" in *all* cases—just in cases transferred to state court. In other instances, it identified *federal* courts as successors. Act of June 16, 1906, ch. 3335, § 17, 34 Stat. 267 (state courts were "successors" in cases "not transferred" to federal court); *id.* § 19 (similar); *id.* § 16 (in cases transferred to federal courts, federal courts were "successor of and [had] all the power of ... Territorial appellate courts"); *see* 1907 Act §§ 1-2 (amending Enabling Act to similarly identify state

courts as successors in cases "not transferred" to federal court).[3]

Oklahoma law. The United States' last statute, the Enabling Act provision making Oklahoma Territory law the post-statehood default, was a standard provision Congress used in Montana, Washington, North Dakota, and South Dakota without transferring jurisdiction to States. Resp. Supp. Br. 9. The United States offers no reason the text would yield a different result in Oklahoma. Instead, Congress *preserved* federal authority, and limited state authority, "respecting ... Indians, their lands, property, or other rights," Enabling Act § 1; *see id.* § 3, but not over non-Indians. Resp. Supp. Br. 9-10. Congress reiterated the point in applying Oklahoma Territory law only "as far as applicable," Enabling Act § 13, and in confirming that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States," *id.* § 21. This text maintains, rather than abrogates, the normal rules.

Indeed, the United States' theory is bizarre. It admits that the Major Crimes Act and General Crimes Act applied in Oklahoma Territory before statehood and Western Oklahoma after. U.S. Merits Br. App'x 3a-4a; *see Ramsey*, 271 U.S. at 469. And it contends that Oklahoma Territory law provided the post-statehood

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[3] The Dawes Act amendment the United States invokes (at 10 n.1) excluded the Indian Territory because the Dawes Act did. Pet'r Br. 48. Moreover, continuing federal criminal jurisdiction over Indian reservations did not turn on this amendment. If it did, § 1153 would never apply on "patent[ed]" land. *But see* 18 U.S.C. § 1151(a).

default statewide. But it says that, somehow, neither Act applied in Eastern Oklahoma. The strange consequence of the United States' campaign to create "one system of justice" in Eastern Oklahoma is that "two different legal regimes" would govern post-statehood Oklahoma. U.S. Supp. Br. 4, 6.

Nonexclusivity. Because the Major Crimes Act refutes its argument, the United States muses (at 20) that the Act may not be "exclusive of state jurisdiction." First, this argument is a red herring: Statute aside, Oklahoma lacks criminal jurisdiction due to the "deeply rooted" principle that Indians on reservations are "free from state jurisdiction." *McClanahan*, 411 U.S. at 168 (quotation marks omitted); *see* U.S. Merits Br. 2 ("Absent an Act of Congress to the contrary, federal jurisdiction over crimes involving Indians is exclusive of state jurisdiction."). Second, the Court cannot reverse based on this argument. Oklahoma has disavowed it. Pet. 13 ("Act gives federal courts exclusive jurisdiction"); Pet. 18 (stating the "federal government has exclusive criminal jurisdiction in such cases" and citing § 1153); State CA10 Br. 11 (crimes covered by "Major Crimes Act ... [are] subject to ... exclusive [federal] jurisdiction"). Third, Oklahoma's disavowal was correct: "[T]he text of § 1153, and [this Court's] prior cases make clear" that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of state jurisdiction," *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993) (citations omitted)—a holding that has been "a necessary premise" of this Court's decisions, *United States v. John*, 437 U.S. 634, 651 (1978)

(discussing *Seymour*); *see Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

Vintage. The United States claims (at 12) that the statutes it invokes "were consistently interpreted" to grant Oklahoma criminal jurisdiction. But no case addressed the issue for decades. Resp. Supp. Br. 14. And Oklahoma's *exercise* of jurisdiction is no more probative than similar lawless assertions of jurisdiction in Florida, Kansas, Idaho, Michigan, Nebraska, Nevada, Washington, New York, North Carolina, South Dakota, and North Dakota. *Id.* at 13-14.

Nor can the United States gain by citing a 1942 Interior Department memo, four decades after Congress acted. Department lawyers acknowledged "[t]he legal uncertainties ... present" "since statehood" after "the state courts" simply "assumed jurisdiction in the [former] ... Indian Territory." Memorandum for Mr. Flanery from N.A. Gray (Aug. 12, 1942), App'x 1a. The pressure to justify that assumption was palpable—given the "[m]any Indians" who "ha[d] been tried, convicted, sentenced, and executed ... without ... the jurisdictional question being raised." *Id.* Yet Department lawyers thought the "only real solution" to some of Oklahoma's unlawfulness was "legislation." *Id.*; *see* U.S. Merits Br. App'x 5a-6a.

Jurisdictional gap. The United States' claims (at 14) of a "jurisdictional gap" do not advance the ball. Such gaps were common nationwide, including in Iowa, Kansas, New York, and North Dakota. Resp. Supp. Br. 12. Where identified, such gaps were filled by BIA

courts—which the United States admits (at 14 n.13) "a pen stroke" could have extended to Eastern Oklahoma—or express jurisdictional transfers. Resp. Supp. Br. 12. Congress deemed these express transfers necessary because they were the only way to legalize otherwise-unlawful state prosecutions, like Oklahoma's, that proceeded where tribal courts were absent. *Id.* By contrast, if courts judicially *implied* transfers whenever a gap arose, these statutes would be superfluous.

Practicalities. The United States is left to argue consequences, amplified by Oklahoma's sur-reply (at 12-17) re-arguing disestablishment. To begin, *City of Sherrill* is available to address many such consequences, and is purpose-built for the task. Resp. Br. 56. To the extent *statutes* attach consequences to reservation status, the whole point of *Solem* and *Parker* is to reserve *to Congress* the choice of whether to remove lands from the rules Congress has enacted for reservations. Such concerns are no reason to find disestablishment, or imply transfer of federal jurisdiction. If, for example, Congress believes affirmance would result in too broad an application of 18 U.S.C. § 2252A's prohibition on child pornography, Okla. Supp. Br. 14, Congress can act. *Cf.* Former U.S. Att'ys Br. 8-9 (cataloging statutes adjusting criminal jurisdiction).[4] Likewise, if Congress

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[4] Nor is it clear that the statutes Oklahoma cites create practical problems. Most prohibit conduct already illegal in Oklahoma, 21 Okla. Stat. Ann. tit. 21, § 1024.1 (child pornography); are dead letters, *United States v. Torrey Cedar Co.*, 154 F. 263, 266 (C.C.E.D. Wis. 1904) (interpreting earlier version of 18 U.S.C. §1853's tree-destruction prohibition as not applying to allotted lands), *aff'd sub*

agrees with United States' evidence-free claim (at 17-18) that affirmance here would "stretch[] federal resources," Congress will provide more.[5]

Only for existing convictions is there a genuine obstacle to congressional fixes. And there, affirmance need not have any broad effect. The Tenth Circuit has held AEDPA bars virtually all "*Murphy*" challenges. Creek Supp. Br. 12. And contra Oklahoma (at 3 n.1), "apparent procedural bars" exist in state court—laches, which applies to jurisdictional challenges. Creek Supp. Br. 12. More to the point, Oklahoma is free to limit state collateral challenges to the same extent as AEDPA. Resp. Supp. Br. 14. So if challenges that are barred in federal court proceed in state court, that is because Oklahoma has *chosen* to allow them.

Moreover, to the extent these barriers do not hold, the Court's first Supplemental Question does not *avoid* consequences for existing convictions. If Oklahoma-specific statutes eliminate federal jurisdiction over reservations, they do the same for restricted allotments and trust lands, where the United States for decades has prosecuted major crimes. Despite three chances, the

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nom. United States v. Paine Lumber Co., 206 U.S. 467 (1907); do not apply to non-Indians, 6 U.S.C. § 606 (tribal homeland-security grants); are subject to *Montana* and *Sherrill* limitations, 16 U.S.C. §§ 3372(a)(1), 3371(c) (prohibiting violations of "enforceable" tribal rules "to the extent" applicable); or restrict federal authority rather than enhance it, 16 U.S.C. § 3378(c)(3) (federal fish-and-wildlife controls do *not* supersede State authority on reservations).

[5] The United States has abandoned *both* its prior unsourced guesstimates of increased burdens. BIO 33-34.

United States has never explained how to distinguish those lands, lamely asserting (at 17 n.4) over and again that they "are not before the Court." Its theory thus "would open the door to litigation by defendants challenging" decades of convictions. Okla. Supp. Br. 12; *e.g.*, *United States v. Williston*, CR-14-85-RAW (E.D. Okla. Dec. 21, 2015), ECF No. 142 (§ 1153 conviction for murder during child abuse). Indeed, because this theory applies to "civil[] laws," U.S. Supp. Br. 10, it could eliminate decades of Creek civil jurisdiction. Concerns about disruption cannot justify departing from the statutory text.

* * *

The United States' brief illustrates why swapping text for story is a bad trade. The United States transforms laws *expanding* federal jurisdiction into *repeals* of federal jurisdiction; rewrites the Enabling Act's directive to treat Oklahoma like *other States* into a command to make Oklahoma *different* from any State; disavows *Negonsott*, *John*, *Seymour*, and *Solem*, all of which recognize that Major Crimes Act jurisdiction is exclusive; disavows *Negonsott* again to hypothesize that Oklahoma, not Kansas, received "the first major grant of jurisdiction" over crimes on Indian reservations; and draws nonexistent distinctions to suggest that, somehow, the federal government might retain jurisdiction over restricted allotments when Congress supposedly transferred to Oklahoma jurisdiction over the entire Indian Territory.

Less contorted answers are at hand. No statute transferred criminal jurisdiction to Oklahoma, just as no statute disestablished the Creek reservation. Federal jurisdiction and the Creek reservation endure.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

August 12, 1942.

MEMORANDUM for Mr. Flannery:

I have examined the attached file and proposed letter to the Attorney General in answer to his Departmental inquiry of April 28, 1941, concerning the jurisdiction of the state courts of Oklahoma over crimes committed by and against Indians on restricted Indian allotments in the areas formerly known as Indian Territory and Oklahoma Territory.

The legal uncertainties which surround the jurisdictional questions have been present since the advent of statehood on November 16, 1907. We all know that as a solution of the problem the state courts have assumed jurisdiction in the territory known as Indian Territory since statehood. Many Indians and white persons living in Indian Territory have been tried, convicted, sentenced, and executed for crimes committed on restricted Indian lands without, so far as I am able to find, the jurisdictional question being raised.

The Indian lands in the western part of the state of Oklahoma, formerly a part of Oklahoma Territory, are in my opinion still Indian country and the jurisdiction of the state courts is lacking. The proposed letter to the Attorney General sets forth the views of this Department and points out the unsettled jurisdictional questions. The only real solution is through legislation. This is indicated in the proposed communication. I feel

that this letter should be signed and forwarded to the Department of Justice and we await their reaction.

/s/

N. A. Gray,
Attorney.